Before the
Federal Communications Commission
Washington, D.C. 20554

Rates for Interstate Inmate Calling Services	WC Docket No. 12-375

SECURUS TECHNOLOGIES, INC. REPLY
IN SUPPORT OF MOTION FOR EXTENSION

Securus Technologies, Inc. ("Securus"), through counsel and pursuant to Public Notice DA 17-249, files this reply in support of its Motion for Extension filed March 10, 2017 (the "Motion"). The Motion received broad support from the Inmate Calling Services ("ICS") industry[1] which is placed in the untenable position of preparing Annual Reports designed to implement rules that remain under review and vulnerable to appeal. Only two parties opposed the reasonable relief that the Motion requests, but neither of them acknowledges the undeniable uncertainty that surrounds most of the *Second Inmate Rate Order*,[2] and they prefer to adopt a stance that is more punitive than productive.[3] The record demonstrates that Rule 64.6060, 47 C.F.R. § 64.6060 – the "Reporting Rule" – should be implemented in a manner that is both

[1] WC Docket No. 12-375, Letter from Tim McAteer, President, ICSolutions to Marlene H. Dortch, FCC (Mar. 27, 2017) ("ICSolutions Letter"); Global Tel*Link Corp. Comments in Support of Securus Motion for Extension (Mar. 28, 2017) ("GTL Comments"); Pay Tel Communications, Inc.'s Comments Regarding Securus Technologies, Inc.'s Motion Seeking Extension of Time to Submit Annual ICS Reports and Request for Clarification (Mar. 28, 2017) ("Pay Tel Comments").

[2] *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Second Report and Order and Third Further Notice of Proposed Rulemaking, FCC 15-136 (rel. Nov. 5, 2015) ("*Second Inmate Rate Order*" or "*Order*").

[3] WC Docket No. 12-375, Letter from Paul Wright, Human Rights Defense Center, to Chairman Pai (Mar. 28, 2017) ("HRDC Letter"); Wright Petitioners, *et al*. Opposition to Securus Technologies, Inc. Motion for Extension of Time (Mar. 28, 2017) ("Wright Opp.").

reasonable and consistent with the text of the *Order*. Reports should be due April 1, 2018, covering 2017 services, or at a minimum should not be due until September 1, 2017, if carriers must be expected to compile 2016 data as the Bureau only recently instructed on March 2, 2017.

I. THE PLAIN LANGUAGE OF THE *SECOND REPORT AND ORDER* DEMONSTRATES THE COMMISSION'S INTENT TO PROVIDE AMPLE TIME FOR ASSEMBLING ANNUAL REPORTS

As Securus showed, the *Second Report and Order* expressly stated that the obligation to file Annual Reports would begin the calendar year *after* approval by the Office and Management and Budget ("OMB"). Motion at 1-2 (quoting *Second Report and Order* ¶ 268). The reporting period would have begun on January 1, 2017, the *Order* states, only if approval had been granted at some point in 2016. *See id*. This language displays an understanding by the full Commission that carriers would need considerable advance notice not only of the due date of the annual reports, but also of the date on which data must be compiled for reporting. The fact that OMB approval was not obtained until January 9, 2017, matters, as does the fact that OMB approval was not published until March 1, 2017.[4]

Global Tel*Link agrees: "The June 1[, 2017] deadline established by the Public Notice contravenes the plain language of the *Second ICS Order*." GTL Comments at 2. That plain language "demonstrates that Commission intended to give ICS providers time between OMB approval of the reporting requirement and the due date of the first report." *Id*.

The full Commission adopted the language of Paragraph 268, instructing carriers to ready themselves to report data that would be compiled during the calendar year ***following*** OMB

[4] The March 1 publication in the Federal Register (82 Fed. Reg. 12183) stated, as the Wright Petitioners admit, that reports are due March 1, 2017. Motion at 4; *see* Wright Opp. at 3 n.7. Securus did not intentionally omit the subsequent correction that was published on March 8, 2017.

approval. The Bureau's decision to require carriers to report 2016 data just three months after publication impermissibly undercuts the Commission's instructions.

HRDC and the Wright Petitioners have no response to this argument. HRDC makes no mention of Paragraph 268 or of the date on which OMB approval was granted. The Wright Petitioners say only slightly more, arguing that approval occurred nine days into 2017, and that "the Commission has more than accommodated the delay by providing two months additional time to submit the reports." Wright Opp. at 3. That argument makes two errors: first, Paragraph 268 flatly states that OMB approval must occur in 2016 in order to trigger reporting for 2017. The Wright Petitioners' apparent position that January 9 was "close *enough*" simply ignores the Commission's language; one is reminded of horseshoes and hand grenades. Secondly, it was not "the Commission" that set the June 1, 2017 filing date: it was the Wireline Competition Bureau. As stated above, the Bureau cannot rewrite or ignore rules that the full Commission adopts. Further, the Wright Petitioners have no response to judicial precedent that the text of FCC rules (here, Rule 64.6060) must be applied in a manner consistent with the text of the underlying order (here, Paragraph 268). Motion at 2 n.4 (citing *McElroy Electronics Corp. v. FCC*, 990 F.2d 1351, 1360 (D.C. Cir. 1993)).

The Commission's instructions in Paragraph 268 should be honored and applied as written. An amended Public Notice should be issued stating that carriers' first annual reports, covering services provided in calendar year 2017, are due April 1, 2018.

II. THE MOTION'S OPPONENTS FAIL TO GRAPPLE WITH THE FACT THAT THE RULES UNDERLYING THE REPORTING REQUIREMENT ARE FAR FROM FINAL

Securus explained that three components of the Reporting Rule, which comprise more than half of the Rule, are under review and extremely vulnerable to reversal. Motion at 3-4

(citing *Global Tel*Link, et al. v. FCC*, No. 15-1461 and consolidated cases (D.C. Cir. filed Dec. 18, 2015)). First, the Commission's authority to regulate intrastate service in any way or to any degree, an issue that the Office of General Counsel conceded a week before oral argument, means that half of the services on which carriers must report are likely to be removed from the Reporting Rule. Secondly, the Video Visitation part of the Rule lacks jurisdiction, and the FCC admits that this service is not ICS. Third, the definition of "site commission" oversteps the FCC's jurisdiction by straying into matters within the purview of law enforcement and penological agencies and likewise faces reversal. It would be at the least wasteful to force carriers to compile, assess, and report data on these items – an effort that must begin now in order to meet the June 1 deadline – when the forthcoming D.C. Circuit decision may well set aside these significant components of the Rule. Motion at 3-4.

Pay Tel agrees: "several critical aspects of the Commission's Annual Report are implicated by the pending appeal[.]" Pay Tel Comments at 2. It argues that "efficiency would dictate an Annual Report filing deadline at some time after the Court has had an opportunity to rule on these issues." *Id*.

Global Tel*Link likewise states that "[t]he ongoing appellate review of the *Second ICS Order* also supports an extension of the current June 1 deadline," GTL Comments at 2, and goes on to argue that "[t]he fact that the annual reporting requirement itself was not stayed does not change the possibility that the data elements may be modified (such as to remove references to intrastate ICS matters) or completely eliminated based on the court's review." *Id*. at 3.

ICSolutions adds that "it is beyond reasonable dispute that the FCC cannot enforce the 2015 Order's rates during the effective time of the *Stay Order*" that prevented much of the *Second Inmate Rate Order* – namely, every intrastate rate – from becoming effective.

ICSolutions Letter at 2. To demand reports on June 1, ICSolutions argues, would be to encroach once again on intrastate matters "under the guise of enforcement." *Id*.

Neither the Wright Petitioners nor HRDC dealt with this crucial issue. Their positions are closely aligned and appear to be little more than a demand to make ICS carriers do more work. HRDC simply complains of "lack of transparency" in the ICS industry, HRDC Letter at 1-2, failing to acknowledge that intrastate rates are tariffed or subject to publication requirements in 26 states and the fact that ICS carriers must disclose all rates in conspicuous fashion. Moreover, the HRDC's desire for knowledge cannot itself endow the FCC with the authority to require reporting on services over which it lacks jurisdiction.

The Wright Petitioners rely on ICS carriers' compliance with Rule 64.6110, 47 C.F.R. § 64.6110, which is a going-forward rate disclosure rule, as proof that they are able to compile, assess, and report the enormous amounts of backward-looking usage data that the Reporting Rule demands. Wright Opp. at 1, 3. Disclosing rates in a "readily available" manner (Wright Opp. at 3) requires a tiny fraction of the effort that the Reporting Rule does. And "the fact that ICS providers generate site commission reports every month," *id*. at 3, a statement that grossly overstates the prevalence of such reports, likewise is not evidence that compliance with the Reporting Rule will impose a mere incremental burden.

The annual reports are an "enormous" task due to the breadth and complexity of the Rule: for Securus, the usage data of 2,000 sites must be aggregated (by type and size of facility) and then disaggregated (for facility-by-facility reporting) for services that in a month likely will be deemed outside the scope of the Commission's authority. Motion at 5. Thoughtlessly demanding all of that work in the name of "transparency" or by harkening to "readily available" rate disclosures fails all reason. For these reasons, opponents' reflexive demand that carriers

comply with the June 1 deadline seems rather more punitive than productive.

Finally, as Securus explained, the pending *Global Tel*Link* appeal will result in a decision that in all likelihood will change the rules underlying the Reporting Rule, and it will require the Commission "to harmonize, and likely clarify, the Reporting Rule" with the D.C. Circuit's opinion. Motion at 4. A June 1 deadline will not afford the Commission or the carriers a reasonable opportunity to do so. As Commissioner O'Rielly recently pointed out, "regulations impose costs on companies and, ultimately, consumers. We must be careful not to place undue burdens on companies whether in specific rulemakings, or as the product of cumulative Commission actions."[5]

CONCLUSION

For all these reasons, the Commission should hold that ICS providers should file their first annual report on April 1, 2018, for the calendar year beginning January 1, 2017. In the alternative, at a minimum, the Commission should extend the deadline for reporting 2016 data until September 1, 2017.

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Respectfully submitted,

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[5] Michael O'Rielly, "Taking Stock of FCC Paperwork Burdens," *FCC Blog*, March 3, 2017 (*available at* https://www.fcc.gov/news-events/blog/2017/03/03/taking-stock-fcc-paperwork-burdens).